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Supreme Court of the United States

REBECCA FRIEDRICHS *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

New York City has a compelling interest in the stability of its labor unions. The City ranks first nationwide in the number of households protected by unions.[1] One-fourth of its resident wage and salary earners are union members.[2] Accordingly, unions, including unions that serve public workers, are critically important to supporting the over one million working- and middle-class families in the City.[3]

The agency shop fee question at issue in this case is of particular significance to the City. The City employs over 325,000 workers—more employees than all but the nine largest companies

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[1] *Compare* Ruth Milkman & Stephanie Luce, *The State of the Unions 2015*, at 1 (2015), *available at* https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Communications/1509_Union_Density2015_RGB.pdf, *with Union Membership, Coverage, Density and Employment by Combined Statistical Area (CSA) and MSA, 2014*, Unionstats.com, http://unionstats.gsu.edu/Met_114b.htm (last visited Nov. 13, 2015).

[2] *Milkman & Luce*, *supra* note 1, at 1.

[3] The Wagner Ctr. for Int'l Bus., Baruch College, *Table 17.I.D: New York City (NYC) Number of Households – by Income Range*, NYCdata, https://www.baruch.cuny.edu/nycdata/income-taxes/hhold_income-numbers.htm (last visited Nov. 13, 2015).

in the country[4]—and 93% of these workers are represented by a union.[5] To promote the uninterrupted provision of services to City residents, the City pioneered granting public employees the right to organize and negotiate, and for decades has operated a successful collective bargaining scheme in which agency shop fees play an integral role. The City submits this brief to explain its unique history and experience with these fees.

Collective bargaining activities in New York City—comprising labor negotiations, contract administration, and pursuit of administrative and judicial remedies—are time- and resource-intensive and require extensive expertise from both the government and union sides. Successful labor relations also require trust between the parties and willingness to compromise. By providing a source of funding based on all of the employees a union represents and bargains for, agency shop fees allow the City's public-sector unions to effectively pursue bargaining strategies that benefit all members

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[4] Alexander E.M. Hess, *The 10 Largest Employers in America*, USA Today (Aug. 22, 2013, 7:48 AM), http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249/.

[5] Mayor's Office of Operations & Dep't of Citywide Admin. Servs., *2013 Workforce Profile Report* 35 (2013), http://www.nyc.gov/html/dcas/downloads/pdf/misc/workforce_profile_report_12_30_2013.pdf.

broadly, rather than short-term or confrontational strategies that may only advance the interests of the factions of employees most willing to pay fees. By protecting the long-term financial stability of unions as bargaining partners, agency shop fees help support unions as effective and responsible bargaining partners, enabling unions to build long-lasting and productive relationships with the City that benefit all residents.[6]

Key among the benefits of an effective partnership and a successful collective bargaining system is the overriding benefit of labor peace, which the City has a particularly compelling interest in maintaining. No other jurisdiction in the nation has more first-hand experience with the immense public cost of labor disputes that go unresolved through collective bargaining. In the 1960s and 1970s, the City endured a series of paralyzing strikes by public school teachers, police officers, and other public workers that harmed millions of City residents, including union members and their families.

The City's longstanding commitment to stable and effective public unions as partners in collective bargaining stems from this direct experience. Those difficult decades directly informed the adoption of new collective bargaining laws, which incorporated

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[6] *See, e.g.*, Brief for the Attorney General of California at 40.

the same agency shop provisions common for unionized workers in private industry. The City's strategy has worked. Few labor disputes now result in strikes that impair the provision of public services.

For nearly half a century, New York City has relied on a collective bargaining system, built on long-term union stability buttressed by agency shop fees, to ensure that labor disputes are settled at the negotiating table without union members risking their livelihoods or City residents losing access to critical governmental services. Prohibiting agency shop fees would strip jurisdictions like New York City of a tool that has for years helped foster productive relationships between governments and their public workforces, without providing any substitute solution or reassurance for the millions of everyday New Yorkers, including the City's public employees, who would ultimately bear the cost of any resulting public strikes. Based on its experience in the 1960s and 1970s, New York City has determined that the risk of work stoppages is not worth taking. This Court should not compel the City to ignore the lessons of its history and bear that risk going forward.

SUMMARY OF THE ARGUMENT

Under traditional collective bargaining models, employees have the right to select a union as their exclusive representative in negotiations. Agency shop provisions allow unions to charge employees who decline to join the union a fee to defray the cost of non-political activities that benefit all employees. Nearly forty years ago, this Court upheld the constitutionality of agency shop provisions in *Abood v. Detroit Board of Education*,[7] and, relying on *Abood*, jurisdictions across the nation have legalized, and negotiated, agency shop arrangements to support public-sector collective bargaining.

New York City submits this brief to make three main points. First, as the City's history illustrates, agency shop fees are directly linked to protecting the public as a whole from the disruption of government services caused by labor disputes. The City embraced agency shop arrangements as part of a comprehensive labor management scheme at a time when existing collective bargaining procedures failed to stem ongoing labor unrest. The change in course helped to stabilize labor relations for the benefit of not just the City's workers, but all City residents.

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[7] 431 U.S. 209 (1977).

Second, New York City's experience demonstrates that petitioners' conception of the government interest in agency shop fees is far too circumscribed. Because of the potentially massive public harm that can arise from the disruption of services, tools that reduce the risk of public-sector strikes—like agency shop fees—are supported by a compelling government interest that far exceeds mere administrative convenience alone.

Third and finally, petitioners and amici are wrong in pointing to differing labor laws nationwide as support for overruling *Abood*. Crafting a public labor relations strategy requires complex policy judgments, and jurisdictions across the nation confronting different circumstances may reasonably select different solutions. But *Abood* wisely left those choices to the political process, a ruling this Court should keep in place.

ARGUMENT

I. The City Adopted Agency Shop Fees in Response to a Series of Devastating Strikes that Imposed Massive Public Harm.

In the City's experience, it is has been, and remains, both prudent and compelling public policy to promote municipal employees' right to collectively bargain through unions. Collective bargaining serves to protect and advance the interests of all public wage-earners and their

families, and also makes the provision of government services more effective.

While these benefits are of tremendous importance to City residents in their own right, they are second to the public's related and overriding interest in labor peace. Whatever the cause for labor disputes, including situations where workers have legitimate complaints about their employment conditions, the public has a compelling interest in not bearing the brunt of labor disagreements. The City submits this brief to explain that interest. As the City's history illustrates, collective bargaining systems supported by agency shop fees were born from a sustained period of repeated public work stoppages. This experience offers an essential historical lesson about the catastrophic costs of discord between public employees and their government employers, absent a robust and effective system of collective bargaining that is trusted by both sides to work in the long run.

A. The City Was an Early Adopter of Collective Bargaining as a Public Labor Relations Model.

Congress granted private-sector workers the right to organize and bargain in 1935.[8] For decades, however, no similar system existed for public-sector workers. Instead, many States, including New York, attempted to deal with public labor disputes by simply banning government workers from striking and imposing harsh fines on violators.[9]

But simply banning strikes without providing an effective mechanism to address and remedy the sources of labor complaints and disagreements proved inadequate.[10] In response, the City pioneered collective bargaining as a way to fairly resolve public labor disputes without employees feeling compelled to walk out on the job.

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[8] *See* National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C § 157 (2012)).

[9] *See* Condon-Wadlin Act, ch. 391, 1947 N.Y. Laws 256 (repealed 1967); *see also* Terry O'Neil & E.J. McMahon, Empire Ctr., SR4-07, *Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws* 3 (2007), available at http://www.empirecenter.org/wp-content/uploads/2013/06/Taylor-Made.pdf.

[10] O'Neil & McMahon, *supra* note 9, at 3 (noting Condon-Wadlin's "mixed effectiveness").

In 1958, Mayor Robert F. Wagner issued an executive order authorizing collective bargaining through public labor unions for certain groups of City workers.[11] The order recognized that "labor disputes between the City and its employees [would] be minimized, and that effective operation of the City's affairs in the public interest [would] be safeguarded, by permitting employees to participate . . . through their freely chosen representatives in the determination of the terms and conditions of their employment."[12] It established the City as "one of the first jurisdictions in the nation to adopt an essentially private sector model for municipal labor relations."[13] Similar rights would not be granted to state workers in any State until 1959,[14] to federal public employees until

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[11] *See* Ronald Donovan, *Administering the Taylor Law: Public Employee Relations in New York* 14 (1990) (describing the Executive Order); O'Neil & McMahon, *supra* note 9, at 4.

[12] Exec. Order (Mayor Wagner) No. 49 § 2 (1958).

[13] Michael Marmo, *More Profile than Courage: The New York City Transit Strike of 1966*, at 72 (1990).

[14] Donovan, *supra* note 11, at v; Steven Greenhouse, *The Wisconsin Legacy*, N.Y. Times, Feb. 22, 2014, at BU1.

1962,[15] or to New York State public employees until 1967.[16]

B. The Right to Collectively Bargain, By Itself, Failed to Ensure Labor Stability in the City.

The right to collectively bargain, however, even paired with a ban on public-sector strikes, proved ineffective at providing sufficient stability in labor relations to prevent the public harms from strikes by government workers. Rather, the City was the epicenter of a series of strikes in the mid- to late-1960s and early 1970s; state officials saw the City as the poster child for the failure of then-existing law to "protect vital public interests."[17] Regardless of whether it was the City, the unions, or both that caused negotiations to be unsuccessful, the effect of the resulting strikes on ordinary New Yorkers—including union members—was profound.

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[15] Exec. Order No. 10,988, 3 C.F.R. 321 (1959–1963).

[16] *See* Public Employees' Fair Employment Act (Taylor Law), ch. 392, §§ 202–03, 1967 N.Y. Sess. Laws 393, 396 (McKinney) (codified as amended at N.Y. Civ. Serv. Law §§ 202–03 (2015)); *see also* O'Neil & McMahon, *supra* note 9, at 6.

[17] Letter from Governor's Comm. on Pub. Emp. Relations to Governor Nelson A. Rockefeller 10 (Jan. 23, 1969) (on file with the New York City Law Department).

The first wave of public-sector strikes hit the City in the mid-1960s:

- In 1965, eight thousand City welfare workers went on strike for twenty-eight days, causing two-thirds of the City's welfare centers to close.[18] The result was a disruption in vital services for 500,000 welfare recipients, many of whom were children or elderly.[19]

- On New Year's Day in 1966, City transit workers began a twelve-day strike that caused economic losses in excess of $100 million per day.[20] The strike effectively shut down the City's subway and bus system, overwhelming railroads, producing historic traffic jams, closing public schools, and forcing the mayor to

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[18] *See* Joshua B. Freeman, *Working-Class New York: Life and Labor Since World War II* 205 (2000); O'Neil & McMahon, *supra* note 9, at 3.

[19] Emanuel Perlmutter, *Welfare Help in a City Curbed by a Walkout*, N.Y. Times, Jan. 5, 1965, at 1, 21; Emanuel Perlmutter, *Welfare Strike Due in City Today in Spite of Writ*, N.Y. Times, Jan. 4, 1965, at 1, 25.

[20] Donavan, *supra* note 11, at 19; Marmo, *supra* note 13, at 151; O'Neil & McMahon, *supra* note 9, at 4; *see also News Summary and Index: The Major Events of the Day: Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33.

> devise "the most urgent civil defense plan New York City has ever had to improvise for its own health and safety."[21] The New York Times observed that "[s]eldom in its history ha[d] New York City been through more difficult days," and that "not since the draft riots of the Civil War ha[d] the normal course of life in this city been more profoundly altered for so many days."[22]

Not surprisingly, in the aftermath of such vast disruption, securing resolution of labor disputes through an effective bargaining system became the foremost priority of City and State government alike. In 1967, based in large part on the City's experience, New York State enacted the Taylor Law, which created a comprehensive scheme for public-sector labor relations designed to "protect[] the public against the disruption of vital public services . . . , while at the same time protecting the rights of public employees."[23] The Taylor Law

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[21] *The Big Crush*, N.Y. Times, Jan. 3, 1966, at 26; Homer Bigart, *New Talks Today: Quill Scores Mayor—Says Walkout Could Last for a Month*, N.Y. Times, Jan. 2, 1966, at 1, 58; *Strict Rules Set on Travel into the City During Strike*, N.Y. Times, Jan. 1, 1966, at 1, 6.

[22] *This Beleaguered City*, N.Y. Times, Jan. 12, 1966, at 20.

[23] Governor's Comm. on Pub. Emp. Relations, *Final Report* 9 (1966) (internal quotation marks omitted) (on file with the New York City Law Department); *see also* Public Employees'

maintained the prohibition on public employee strikes, but was also designed to address and prevent the root causes of strikes by creating an overarching process for collective bargaining, the automatic deduction of union dues from paychecks (a "dues check-off"), and a "new administrative agency charged exclusively with the regulation of public sector labor relations."[24]

Importantly, the Taylor Law was also drafted to "provide for flexibility and diversity in public employment relationships—to provide, that is, a kind of state-wide laboratory for the conduct of experiments and research in such relationships."[25] It accordingly permitted local governments to establish their own labor relations schemes, provided they were "substantially equivalent" to

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Fair Employment Act (Taylor Law), ch. 392, § 200, 1967 N.Y. Sess. Laws 393, 394 (McKinney) (codified as amended at N.Y. Civ. Serv. Law § 200 (2015)) (describing its purpose as "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring . . . the orderly and uninterrupted operations and functions of government").

[24] Donovan, *supra* note 11, at v; O'Neil & McMahon, *supra* note 9, at 6.

[25] Donovan, *supra* note 11, at 40 (quoting Walter E. Oberer, Kurt L. Hanslowe, & Robert E. Doherty, *The Taylor Act: A Primer for School Personnel (and Other Beginners at Collective Negotiations)* 1 (1968)) (internal quotation marks omitted).

those contained in the Taylor Law.[26] In anticipation of this provision of the Taylor Law, the City passed its own Collective Bargaining Law, creating an Office of Collective Bargaining to "effectuat[e] labor relations and collective bargaining between public employers and institutions in the city and their employees."[27] The City's law went into effect on the same day as the Taylor Law.[28]

While a step in the right direction, the new collective bargaining laws failed to stem public-sector strikes. Disagreements between the City and public-sector unions continued to impose enormous financial costs and exact harm on the public:

- In February 1968, the City's sanitation workers went on strike, causing nearly 100,000 tons of refuse to pile up in the streets (roughly the equivalent of two ocean liners each the size of the RMS

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[26] Public Employees' Fair Employment Act, § 212, 1967 N.Y. Sess. Laws 393, 402 (McKinney) (codified as amended at N.Y. Civ. Serv. Law § 212(2)); Donovan, *supra* note 11, at 104.

[27] Local Law No. 53 (1967) of City of New York.

[28] John V. Lindsay, City of N.Y., *Report Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act* 1 (1969) [hereinafter Lindsay, Report] (on file with the New York City Law Department).

Titanic).[29] Accumulating garbage led to a proliferation of trash fires and the City's first general health emergency since the 1931 polio epidemic.[30] The New York Times described the scene as resembling "a vast slum as mounds of refuse grew higher and strong winds whirled the filth through the streets."[31]

- Later in 1968, three teacher walkouts caused more than a million children to miss thirty-six days of school.[32] The City's poorest children were the hardest hit: of the 400,000 free daily lunches normally given to needy kids, only around 160,000 were provided during the walkouts.[33] Some parents responded with improvised schools in churches and storefronts, while others resorted to smashing doors and

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[29] *See Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 23; Tad Fitch, J. Kent Layton & Bill Wormstedt, *On a Sea of Glass: The Life and Loss of the RMS Titanic*, at App. A (2013).

[30] *See Fragrant Days in Fun City*, *supra* note 29, at 23.

[31] Emanuel Perlmutter, *Shots Are Fired in Refuse Strike; Filth Litters City*, N.Y. Times, Feb. 5, 1968, at 1, 37.

[32] *See* Leonard Buder, *Strike Cripples Schools, No Settlement in Sight*, N.Y. Times, Oct. 15, 1968, at 1, 38; *Strike's Bitter End*, Time, Nov. 29, 1968, at 89.

[33] *See Strike's Bitter End*, *supra* note 32, at 89.

windows to open their children's schools.[34]

- In January 1971, the City's police force participated in an unscheduled walkout. For six days, only 15% of the City's patrolmen reported for work.[35] The Chicago Tribune described the strike as a "spectacle" as the nation's largest city was "nakedly exposed to the threat of criminality on a massive scale."[36]

Clearly, more had to be done to forge an effective system of collective bargaining that would serve, consistently and in the long term, as a stable alternative to public-sector strikes and work stoppages.

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[34] Leonard Buder, *Parents Smash Windows, Doors to Open Schools*, N.Y. Times, Oct. 19, 1968, at 1, 26; *Strike's Bitter End*, *supra* note 32, at 89.

[35] Jeffrey A. Kroessler, *New York Year By Year: A Chronology of the Great Metropolis* 309 (2002); *The Police Strike in New York*, Chi. Trib., Jan. 21, 1971, at 20; Richard Reeves, *Police: 'Attention Must Be Paid!' Say the Men on Strike*, N.Y. Times, Jan. 17, 1971, at E1.

[36] *The Police Strike in New York*, *supra* note 35, at 20.

C. The City Advocated for Agency Shop Provisions to Complete Its Development of an Effective Collective Bargaining System.

It was at this pivotal time, in the midst of a second wave of strikes, that New York City began to tout agency shop provisions. In 1969, Mayor John V. Lindsay unsuccessfully urged the state legislature to adopt "the agency shop, a recognized form of union security," as a means of promoting both "labor harmony and responsibility."[37]

Three years later, in 1972, the City explicitly authorized agency shop arrangements. Relying on the New York Court of Appeals' interpretation of the Taylor Law as granting municipalities the right to take steps to provide "a degree of union security[] to bargaining agents for public employees,"[38] the

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[37] Lindsay, Report, *supra* note 28, at 9–10. The City pursued agency shop arrangements that same year. *See, e.g.*, Letter from Herbert L. Haber, Dir., Office of Labor Relations, to Joseph V. Terenzio, Comm'r, Dep't of Hosps. (Mar. 19, 1969) (on file with the New York City Law Department) (discussing agency shop arrangement for hospital union).

[38] *Bauch v. New York*, 21 N.Y.2d 599, 606 (1968); *see also* John V. Lindsay, City of N.Y., *Report and Plan Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act* (Taylor Law) (1969) 44–46, *reprinted in* New York Legislative Service, NYLS' New York City Legislative History for Local

City amended its Collective Bargaining Law to allow the negotiation of agency shop arrangements to the extent otherwise permitted by law.[39]

At the time, the constitutionality of agency shop arrangements for public-sector unions had not yet been established. In 1977, however, this Court decided in *Abood* that agency shop arrangements were lawful for public-sector unions, so long as objecting employees were not required to pay fees for activities unrelated to collective bargaining.

New York State quickly moved to adopt the same agency shop solution that the City had already embraced. The state legislature amended the Taylor Law to mandate agency shop fees for state employees and make them a mandatory subject of negotiation at the local level.[40] The

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Law No. 1 (1972) of City of N.Y, at unnumbered 67–69 (on file with the New York City Law Department).

[39] *See* Local Law No. 1 (1972) of City of New York § 10; *see also* Presentation by the Majority Leader, Thomas J. Cuite 4, *reprinted in* New York Legislative Service, *supra* note 38, at unnumbered 221. In *Bauch v. New York*, the Court of Appeals acknowledged that "[t]he maintenance of stability in the relations between the city and employee organizations, as well as the avoidance of devastating work stoppages, are major responsibilities of the city administration." 21 N.Y.2d at 607. The City interpreted agency shop arrangements as "further[ing] these objectives." *Id.*

[40] *See* Act of Aug. 3, 1977, ch. 677, § 3, 1977 N.Y. Sess. Law 1081, 1082 (McKinney); *see also* O'Neil & McMahon, *supra*

Taylor Law amendments explicitly relied on the *Abood* decision; a full copy of the decision was included in the bill jacket.[41]

In support of the amendments, the City pointed out that agency shop arrangements "generate a more stable and responsible labor relation atmosphere at the bargaining table" by providing unions with the organizational security necessary to resist "divisive elements"—those within and without their ranks who undermine meaningful negotiation—thereby deterring strikes.[42] After passage of the amended Taylor Law, the Mayor

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note 9, at 24 n.17. In 1992, the State amended the Taylor Law to require agency shop arrangements for all public employees. *See* Act of July 24, 1992, ch. 606, § 2, 1992 N.Y. Sess. Laws 1650, 1650 (McKinney); *see also* O'Neil & McMahon, *supra* note 9, at 24 n.17.

[41] *See* Bill Jacket for Act of Aug. 3, 1977, ch. 677.

[42] Richard L. Rubin, Memorandum in Support (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677; *see also* Memorandum from Donald H. Wollett, N.Y. State Office of Emp. Relations, to Judah Gribetz, Counsel to the Governor (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677 (noting that agency shop arrangements "provide[] to employee organizations the organizational security necessary for responsible collective bargaining").

"direct[ed] the appropriate City Agencies to implement [the] agreements expeditiously."[43]

D. New York City's Experience Confirms that Agency Shop Fees Protect the Public.

The history of agency shop fees in New York City illustrates three key points. First, agency shop fees were adopted as part of a comprehensive program—borrowed from successful private-sector labor union schemes—designed to protect the public as a whole from the catastrophic harm of public-sector strikes.

Second, the City and State did not embrace agency shop provisions in isolation. Rather, they served to buttress the existing labor relations framework, designed to promote union security at a time when collective bargaining alone proved inadequate to prevent continued public-sector strikes.

Third and finally, New York City's experience confirms that a stable collective bargaining scheme which includes agency shop provisions to promote responsible bargaining is a successful formula for

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[43] Admin. Order (Mayor Beame) No. 38 (1977) (on file with the New York City Law Department).

achieving labor peace. Certainly, no labor relations system is perfect, nor can the value of any component of a bargaining scheme be measured in isolation. But collective bargaining paired with agency shop fees has worked in the City and across New York State more broadly.

In the first 15 years after the Taylor Law (1967–1982), there were, on average, about 20 public-sector strikes per year in New York State.[44] Thereafter, and beginning within only a few years of state-wide implementation of agency shop provisions as part of a broader collective bargaining scheme, the rate of strikes plummeted by well over 90%, to fewer than two per year across all of New York State—a dramatic surge in the record of cooperation between labor and government.[45] Indeed, in general, "the last quarter-century has been an era of labor tranquility in the state and local government throughout New York,"[46] benefitting the public and ensuring fair treatment for workers. While the causal explanation for this historical pattern may be multifaceted, government employers like New York City have good reason to view agency shop provisions as an important part of the solution, particularly when testing

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[44] *See* O'Neil & McMahon, *supra* note 9, at 10.

[45] *Id.*

[46] *Id.*

alternatives would risk regression from the existing record of success and public protection.

II. Petitioners and Amici Ignore the Compelling Public Interest in Solutions That Reduce the Risk of Public-Sector Strikes and Disruption of Public Services.

The history of New York City's collective bargaining system demonstrates that petitioners and amici identify the government interests in promoting effective public-sector collective bargaining far too narrowly. In framing the relevant First Amendment question, petitioners contend that the "only conceivable" government interest in labor peace that supports agency shop fees is the possibility that, absent fees, public-sector "union[s] will go bankrupt," forcing government employers to bargain with multiple entities, rather than a single union.[47]

Petitioners minimize the governmental interest at stake by taking the risk of public harm out of the constitutional equation. But it was this very harm—the devastating consequences of public-sector labor strikes, and not simply the possibility of union bankruptcies—that animated the authorization of agency shop fees in the City and in

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[47] Brief for the Petitioners at 30.

New York State more generally. Petitioners ignore decades of history and the hardships endured by millions of City residents when they attempt to diminish the government's interest in agency shop arrangements to the administrative convenience of reducing bargaining hours alone.

The experience of New York City also refutes petitioners' characterization of the government interests at stake in another fundamental way. Petitioners refer to "[t]he government's interest" in labor peace as if there were a single, uniform government interest that could be meaningfully analyzed by this Court.[48] But we are a nation of many different governments—federal, state, and local—all with widely differing circumstances, histories, and needs. As the City's experience illustrates, mandating one solution for all jurisdictions is not a workable constitutional rule.

Disruption of services presents an untenable risk in New York City due to its size, density, and diversity. The City has nearly eight-and-a-half million residents[49]—more residents than forty

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[48] *Id.* (emphasis added).

[49] *See Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2014 Population: April 1, 2010 to July 1, 2014*, U.S. Census Bureau (2015), http://factfinder.census.gov/bkmk/table/1.0/en/PEP/2014/PEPANNRSIP.US12A.

States[50]—all living in a compact geographic area, making the City the most densely populated major city in the nation.[51] Further, over 600,000 people commute into the City each weekday,[52] and the City hosts over 56 million tourists each year.[53] The City also has an incredibly diverse population: more than 35% of City residents were born outside

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[50] *Population Facts*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Nov. 3, 2015).

[51] Mike Maciag, *Mapping the Nation's Most Densely Populated Cities*, Governing (Oct. 2, 2013), http://www.governing.com/blogs/by-the-numbers/most-densely-populated-cities-data-map.html.

[52] Sam Roberts, *Commuters Nearly Double Manhattan's Daytime Population, Census Says*, N.Y. Times: City Room (June 3, 2013, 11:56 AM), http://cityroom.blogs.nytimes.com/2013/06/03/commuters-nearly-double-manhattans-daytime-population-census-says/.

[53] Press Release, City of N.Y., *Mayor de Blasio and NYC & Company Announce New York City Welcomed an All-Time Record 56.4 Million Visitors in 2014* (Feb. 2, 2015), http://www1.nyc.gov/office-of-the-mayor/news/082-15/mayor-de-blasio-nyc-company-new-york-city-welcomed-all-time-record-56-4-million.

of the United States,[54] and City public school students speak 176 different languages.[55]

As a result of the City's unique attributes, its residents are particularly dependent on public services. For example:

- Because less than half of City households have a car, New Yorkers—like the City's thousands of commuters—are especially reliant on public transportation.[56] Mass transit provides nearly nine million rides every weekday, and thousands of businesses could not operate if their employees were unable to get to work.[57]

- The volume of residents, visitors, and businesses in the City also results in an

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[54] N.Y.C. Dep't of Planning, *The Newest New Yorkers* 2, 10 tbl.2-1 (2013), available at http://www.nyc.gov/html/dcp/pdf/census/nny2013/nny_2013.pdf.

[55] Sam Roberts, *Mamuj? Vlashki? Garifuna? In New York, You Hear It All*, N.Y. Times, Apr. 29, 2010, at A1.

[56] Derek Thompson, *Why Do the Smartest Cities Have the Smallest Share of Cars?*, The Atlantic (Jan. 22, 2014), http://www.theatlantic.com/business/archive/2014/01/why-do-the-smartest-cities-have-the-smallest-share-of-cars/283234/.

[57] *The MTA Network*, Metro. Transp. Auth., http://web.mta.info/mta/network.htm (last visited Nov. 13, 2015).

enormous amount of waste—over 23 thousand tons every day—which the City employs a small army of sanitation workers to collect.[58]

- The City operates the largest fire and police departments in the country,[59] as well as the largest single-district public school system,[60] for which the City employs over 90 thousand educators who teach nearly a million public school students each day.[61]

Because of the scale of services available in the City, and City residents' dependence on them, even

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[58] *Inside DSNY*, N.Y.C. Dep't of Sanitation, http://www1.nyc.gov/assets/dsny/about/inside-dsny.shtml (last visited Nov. 13, 2015).

[59] Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, *Local Police Departments, 2013: Personnel, Policies, and Practices* 3 (2015), *available at* http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf; *About*, N.Y.C. Fire Dep't, http://www.nyc.gov/html/fdny/html/about/index.shtml (last visited Nov. 13, 2015).

[60] *Enrollment, Poverty, and Federal Funds for the 100 Largest School Districts, by Enrollment Size in 2010*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics (2013), http://nces.ed.gov/programs/digest/d12/tables/dt12_104.asp.

[61] *Statistical Summaries*, N.Y.C. Dep't of Educ. (2014), http://schools.nyc.gov/AboutUs/schools/data/stats/default.htm.

relatively small disruptions can have devastating effects.[62] Less than a week without mass transit, for example, can cost the City economy over a billion dollars.[63] A week without garbage collection floods the streets with refuse, threatening a public health crisis.[64] One day without teachers squanders a million days' worth of learning.[65] Simply put, the damage inflicted by public-sector strikes is too great to risk. The City therefore has an overriding interest in implementing a collective bargaining system that works.

Contrary to petitioners' argument, the incremental benefit of agency shop fees—and the stable unions they support—does not have to be overwhelming for agency shop fees to be constitutionally permissible. The harms of public-sector work stoppages are so large, particularly in the City, that even a marginal reduction in the risk of public-sector strikes provides compelling grounds for authorizing agency shop arrangements. This is not an after-the-fact or theoretical justification. The City *tried* implementing collective bargaining

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[62] *See supra* Part I.

[63] *See* Mike Pesca, *The True Cost of the NYC Transit Strike*, NPR (Dec. 21, 2005, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=5064612.

[64] *See supra* Part I.B.

[65] *Cf. Statistical Summaries*, *supra* note 61.

without agency shop fees, but it did not result in labor peace. Just the opposite: harmful public-sector strikes continued.

III. Differing Labor Laws Reflect Fundamental Policy Choices About Labor Management and Government and Provide No Reason to Constitutionalize a Single Rule Prohibiting Agency Shop Fees.

To be sure, not all jurisdictions authorize agency shop fees. Petitioners' amici point to the variety of labor laws across the nation as though it is evidence that agency shop fees are unnecessary.[66] But divergence in public-sector labor laws is to be expected. State and local governments across the nation confront radically different circumstances. What works in New York City is not necessarily the best solution in Madison, Wisconsin or Fort Worth, Texas.

Again, history matters. While several States have laws that prohibit agency shop fees (known as "right to work" laws), many of those laws were enacted long before the 1960s.[67] The people in those

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[66] *See, e.g.*, Brief of Amicus Curiae Mackinac Center for Public Policy in Support of Petitioners at 5.

[67] *Right-To-Work Resources*, Nat'l Conf. of State Legislators, (2015), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx.

States did not experience the same series of strikes that New Yorkers endured in the 1960s and 1970s. Their legislative choices about labor peace should not control in New York or any other jurisdiction.

The differing pattern of labor laws across the nation cannot prove or disprove the utility of agency shop fees. Instead, the broad range of laws reflects differing judgments about the best means of managing a public labor force. Some right-to-work States, for example, ban collective bargaining by public-sector workers altogether.[68] Those States have simply rejected collective bargaining full-stop as a labor management strategy. Their laws provide no guide for jurisdictions like New York City that have made a foundational choice to embrace bargaining as a labor management solution.

Nor have all current right-to-work jurisdictions necessarily made the same judgments across the board. Indeed, some such States themselves recognize the compelling governmental interest in labor peace that petitioners and amici ignore. For example, while Michigan and Wisconsin currently prohibit agency shop fees for some public unions, both States exempt local police and firefighter

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[68] For example, Texas does not permit the recognition of public labor unions as bargaining agents, nor does it allow state officials to enter into collective bargaining contracts with public employees. Texas Gov't Code § 617.002 (2015).

unions.[69] The exemptions were justified on public safety grounds—when signing the bill, Wisconsin's governor stressed: "[T]here's no way we're going to put the public safety at risk."[70] Thus, even right-to-work jurisdictions recognize the costs of public labor unrest and have been unwilling to risk disruptions in what they deem to be their most essential services. For those services, agency shop fees were retained as a necessary tool to protect the public.

The same concerns justify broader use of agency shop fees in other jurisdictions. Decisions about risk tolerance and judgments about which services are essential necessarily differ across the country. As this Court has recognized time and time again, "'There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions.'"[71] Given its unique circumstances and history, for example,

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[69] *See* Mich. Comp. Laws § 423.210(4) (2015); Wis. Stat. §§ 111.81(9), 111.845, 111.85 (2015).

[70] Mark Niquette, *Walker's Bill Gives Wisconsin Police a Pass on Pension Payments*, Bloomberg (Feb. 25, 2011, 12:00 AM), http://www.bloomberg.com/news/articles/2011-02-25/walker-says-public-safety-means-wisconsin-cops-keep-collective-bargaining.

[71] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

New York City may reasonably view its full menu of public services as essential to public safety and welfare, and thus extend to all public unions the same agency shop protection that other jurisdictions provide to police and firefighter unions. The fact that other jurisdictions reach different conclusions about when agency shop fees are necessary to protect their residents in no way undermines the City's considered judgment about the benefit of agency shop arrangements for City residents.[72]

At bottom, petitioners and their amici draw precisely the wrong conclusion. The diversity of labor laws nationwide is reason for this Court to adhere to *Abood*'s flexible framework, not to abandon it. Just as there is no single labor management strategy that works for all private businesses and industries nationwide, there is no single labor relations system that suits the needs of all the diverse governments in the United States.

This is true for a simple reason. Decisions about agency shop fees cannot be divorced from broader

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[72] The range of permissible policy judgments about labor practices is incredibly broad. While most jurisdictions prohibit public workers from striking, some States authorize strikes by some or all government workers. *See, e.g.*, Ohio Rev. Code Ann. § 4117.14(D)(2) (2015). But the existence of those laws does not refute the need to limit or prohibit public-sector strikes elsewhere.

judgments that jurisdictions make about their overall labor relations strategy and risk tolerance for public-sector strikes. Half a century ago, New York City determined that secure public unions were key to providing uninterrupted public services to residents. To help stabilize unions, the City championed agency shop arrangements, but only as part of a more comprehensive program that embraced public-sector unions as partners to promote the welfare of City residents.

The City made a fundamental choice to adopt a collective bargaining system, and through it promote secure unions focused on long-term relationships as the cornerstone of its labor relations policy.[73] That commitment extends to the very structure of City government itself. For example, the City's independent Office of Collective Bargaining structures and oversees interactions between the City, its unions, and their members.[74] In addition, the City's Municipal Labor Committee, which is composed of union representatives, coordinates with the City on behalf of unions on issues of general, citywide application.[75] Unions

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[73] *See* N.Y.C. Admin. Code § 12-302 (2015).

[74] *About*, N.Y.C. Office of Collective Bargaining, http://www.ocb-nyc.org/about/ (last visited Nov. 13, 2015).

[75] N.Y.C. Admin. Code §§ 12-303(k), 12-310(a)(2).

also serve on the boards of pension funds,[76] and have even supported using those funds to provide financial support to the City when it faced bankruptcy.[77] In short, the City's public unions play a critical role in the everyday administration of the City's labor relations.

More broadly, as New York City's history confirms, and as this Court has long recognized, decisions about labor policy and managing government workers are inseparable from core political choices about "integral governmental functions," including decisions about how best to administer and "furnish[] public services."[78] Agency shop fees are one tool that state and local governments use to implement diverse labor policies based on diverse judgments about how government should function.

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[76] E.g., *id.* § 13-216(a)(5)–(12) (providing for officials from police unions to sit and vote on board of police pension fund).

[77] *See* Eric Jaffe, *The Time the Teacher's Union Saved New York from Bankruptcy*, CityLab (July 24, 2013), http://www.citylab.com/work/2013/07/time-teachers-union-save-new-york-city-bankruptcy/6306/ (describing how teachers union pension fund bought city bonds to help avert City bankruptcy).

[78] *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

For this reason, mandating one nationwide rule on agency shop fees would not only be contrary to *Abood*, it would be deeply inconsistent with this Court's recognition that needs vary across the nation,[79] and that local communities may make fundamentally different choices about the operation of government, including about core labor policies.[80]

Petitioners and amici mistake public controversy for constitutional error. Public unions are currently a hot-button issue, but that hardly justifies overruling *Abood*. The debate over unions is part of a broader dispute about the proper role of government, but such political questions are best resolved at the ballot box—not by circumventing the legislative process and constitutionalizing a rule about agency shop fees. Indeed, "[t]he genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and

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[79] *See Kelo v. City of New London*, 545 U.S. 469, 482 (2005) ("Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.").

[80] *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (discussing the role, and virtues, of federalism).

functions the public welfare requires."[81] Consistent with this principle, *Abood* left the "wisdom" of adopting agency shop fees to voters in each State, ensuring that no labor relations policy is frozen in place.[82] In fact, while *Abood* itself concerned a Michigan law authorizing agency shop fees,[83] Michigan recently limited the use of such fees.[84] Such change was accomplished through state-specific legislation, not a constitutional rule that imposed Michigan's choice on other communities.

For decades, New York City has relied on stable unions as a key part of its governance strategy, one that embraces the provision of services to strengthen the fabric of the City and better the lives of its residents, while also ensuring fair treatment and protection for workers who serve the public. While other jurisdictions may make different choices, this Court should not embed those choices in a constitutional rule that overrides the long-term, successful labor relations strategy of

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[81] *Garcia*, 469 U.S. at 546 (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

[82] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–25 (1977).

[83] *Id.* at 211.

[84] *See, e.g.*, Jack Spencer, *Right-to-Work Bills Pass Michigan House, Senate*, Mich. Capitol Confidential (Dec. 7, 2012), http://www.michigancapitolconfidential.com/18028; *see also* Mich. Comp. Laws § 423.210(3)(c) (2015).

New York City, or the similar strategies that have been adopted and long-used by many States and cities, to build an effective collective bargaining system to resolve public-sector labor disputes.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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